

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 19, 2012

v

YSMAEL PALACIOS DELEON, III,

Defendant-Appellant.

No. 302761
Muskegon Circuit Court
LC No. 09-058336-FC

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant pleaded *nolo contendere* to assault with intent to murder, MCL 750.83; possession of a firearm during the commission of a felony, MCL 750.227b; and two counts of resisting and obstructing a police officer, MCL 750.81d after reaching a *Cobbs*¹ agreement. Defendant was sentenced to 17-1/2 to 40 years' imprisonment for the assault with intent to murder conviction, two years' imprisonment for the felony-firearm conviction, and one to two years' imprisonment for each conviction of resisting and obstructing a police officer. This Court granted defendant leave to appeal the issue whether his plea was entered voluntarily, knowingly, and intelligently and whether he should be allowed to withdraw the plea. *People v Deleon*, unpublished order of the Court of Appeals, entered April 8, 2011 (Docket No. 302761). We affirm.

At the plea hearing, the prosecutor placed the agreement on the record, stating:

The Court has indicated that the Court would obviously impose the mandatory two years on the felony firearm to be served consecutively with 200 - - not more than 210 months in the Michigan Department of Corrections.

The trial judge summarized the agreement:

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

That is, that if you were to plead guilty and I accept your pleas to all four charges, the first would be the two years required charge [sic] for the felony firearm, and then after that period of incarceration not to exceed 210 months.

At sentencing, when defendant was sentenced to 17-1/2 to 40 years' imprisonment for the conviction of assault with intent to commit murder, neither defendant nor defense counsel objected.

Appellate defense counsel moved in the trial court for specific performance or plea withdrawal. At an evidentiary hearing, defendant's trial counsel testified that she understood 17-1/2 years to be the minimum maximum and that she discussed this with defendant. During the discussions, she wrote the guidelines, 135 months to 225 months, and then she wrote the word "to" followed by the word "life." After the word "life," she put in parenthesis 30, 40, 50, 60, 70 and told defendant that the second number was given as a term of years determined by the trial court. Defendant testified that counsel discussed the plea with him. He understood that his sentence would not exceed 19-1/2 years (17-1/2 years for the assault with intent to murder conviction and two years for the felony-firearm conviction), but he was confused when defense counsel went over the sentencing guidelines with him. Following the evidentiary hearing, the trial court entered an order denying defendant's motion and finding trial counsel's testimony accurate and credible and that "at the time of the pleas defendant understood that he had a sentence agreement that his minimum sentence on the Assault with Intent to Murder Charge would not exceed 210 months."

A trial court's decision to grant a motion to withdraw a plea is not "disturbed on appeal absent a clear abuse of discretion that resulted in a miscarriage of justice." *People v Boatman*, 273 Mich App 405, 406-407; 730 NW2d 251 (2006) (citation omitted). Whether a defendant's sentence exceeded the trial court's preliminary evaluation is a question of fact reviewed for clear error. *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997). "A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made." *Id.* "[A] defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary examination." *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

In this case, the plea agreement as placed on the record was ambiguous. The prosecutor and the trial court referred to the two year sentence for the felony-firearm conviction and a period of incarceration for the assault with intent to murder conviction as "not more than 210 months" or "not to exceed 210 months." There is no indication, on the record of the plea, whether 210 months referred to the maximum minimum sentence or the maximum sentence. However, at the evidentiary hearing, defendant's trial counsel testified that she explained to defendant that 210 months was the maximum minimum and that the trial court would determine the maximum sentence. The trial court found this testimony credible, and defendant did not refute it other than to claim he did not understand defense counsel when she went over the guidelines and believed his sentence would not exceed 19-1/2 years. Based on the entire record, including the evidentiary hearing, the trial court's findings of fact do not leave a "definite and firm conviction that a mistake has been made" and they are not clear error. *Everard*, 225 Mich

App at 458. The trial court did not err when it determined that defendant's sentence did not exceed the preliminary evaluation. *Id.* Defendant has not shown that the trial court abused its discretion, resulting in a miscarriage of justice, when it denied defendant's motion to withdraw his plea. *Boatman*, 273 Mich App at 406-407.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens